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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

PHOENIX ENGINEERING, INC., *et al.*,
Petitioners,

v.

MK-FERGUSON OF OAK RIDGE COMPANY, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF FOR RESPONDENTS MK-FERGUSON OF OAK RIDGE COMPANY AND KNOXVILLE BUILDING AND CONSTRUCTION TRADES COUNCIL, AFL-CIO, IN OPPOSITION

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QUESTION PRESENTED

Does the National Labor Relations Act (NLRA) preempt private construction contractors, selected by a federal agency to perform construction on a federally-owned nuclear reservation, and labor organizations representing their employees, from negotiating and implementing a bargaining agreement authorized by Section 8(e) and 8(f) of the NLRA, on the federally-funded construction project?

STATEMENT UNDER RULE 29.1

Respondent MK-Ferguson of Oak Ridge Company is a wholly owned subsidiary of the Morrison-Knudson Corporation of Boise, Idaho. Respondent Knoxville Building and Construction Trades Council, AFL-CIO, is an unincorporated labor organization headquartered in Knoxville, Tennessee. It has no parent company or subsidiary.

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Respondents MK-Ferguson of Oak Ridge Company and Knoxville Building and Construction Trades Council, AFL-CIO, respectfully submit this brief in opposition to the petition for a writ of certiorari in this case.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-A-30-A) is reported at 966 F.2d 1513. The opinions of the district court (Pet. App. 32-C-56-G) are not reported.

STATEMENT OF JURISDICTION

The order of the court of appeals dismissing petitioners' appeals (Pet. App. 1-A-30-A) was entered June 11, 1992. The order of the court of appeals denying rehearing and rehearing *en banc* (Pet. App. 31-B) was entered

July 27, 1992. The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

The text of Sections 2(2), 8(e) and 8(f) of the National Labor Relations Act (29 U.S.C. §§ 152(2), 158(e) and 158(f)) are reproduced at pages 2-4 of the petition.

STATEMENT OF THE CASE

The Department of Energy's Oak Ridge Operations

MK-Ferguson of Oak Ridge Company entered into a Management and Operating (M&O) contract with the Department of Energy (DOE) to manage and perform construction for DOE at its mammoth nuclear research and development facility in Oak Ridge, Tennessee (ORO), effective October 1, 1990. Although DOE exercises supervision of activities at ORO, day-to-day responsibility for the operational functions of the reservation and for the on-going construction program have been delegated to independent, private M&O contractors since the facility's establishment in the 1940s.[1]

Current construction activity at ORO involves both new construction and alteration of the buildings on three separate sites: the Weapons Production Plant, the Oak Ridge National Laboratory, and the Gaseous Diffusion Plant. The ORO construction expenditures for the years 1990 through 1997 were estimated to be between $50 and $80 million each year.

In 1989, DOE advertised for bids for consolidated construction management services at ORO. One of the elements of the DOE's Request for Proposal requested bidders to describe their intended labor relations approach. In its response, MK-Ferguson stated that it intended to

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[1] The NLRB first asserted jurisdiction over ORO M&O contractors in 1947. *Carbide and Carbon Chemical Corp.*, 73 N.L.R.B. 134 (1947).

extend prehire recognition to the Knoxville Building and Construction Trades Council and attempt to negotiate a project labor agreement.[2]

MK-Ferguson was selected in May, 1990 and commenced negotiations for its recommended project labor agreement on or about June 29, 1990. DOE did not participate in the negotiations and did not direct the contractor's bargaining strategy.

A tentative project labor agreement was achieved on or about July 16, 1990. It entailed pre-hire recognition of the construction trades unions, a commitment to seek referrals for craft union positions under a negotiated job referral procedure, and a requirement that all contractors and subcontractors on the project must subscribe to the terms of the labor agreement. All contractors are qualified to bid on ORO construction, regardless of union affiliation, provided only that upon successful contract award, the contractor must agree to abide by the terms of the agreement for ORO work only. In addition, the proposed agreement contained a no-strike commitment, grievance and arbitration machinery, a mechanism for adjustment of wages and benefits over term and other ORO-specific working conditions. DOE is not a party to the agreement. *See*, Pet. App. 46-F.

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[2] MK-Ferguson attached four separate project labor agreements which the Company had negotiated and applied, with significant success, on public and private sector projects throughout the United States, including the agreement MK-Ferguson had negotiated on behalf of the Saturn Corporation in Spring Hill, Tennessee and which had been expressly validated by the General Counsel of the National Labor Relations Board. *Morrison-Knudsen Co.*, 13 NLRB Advice Mem. Rptr. ¶ 23,061 (NLRB-GC 1986). Other project agreements covered construction for the U.S. Army at Ft. Drum, New York, and for DOE at nuclear facilities in Hanford, Washington, the Idaho National Engineering Laboratory, and Savannah River, South Carolina.

The proposed agreement was the same, in all material respects, as the labor agreement that had applied to construction work at ORO from 1956 to 1983.

Subsequently, after protests by several local contractors, including petitioners in this matter, MK-Ferguson and the Knoxville Building and Construction Trades Council refined the job referral procedures, including incorporation of a key employee procedure which would permit any contractor to select up to four employees without resort to the union hiring halls. Complete agreement on the project labor agreement and job referral procedures was achieved in September, 1990.

Decisions Of The Courts Below

Petitioners filed a complaint against the United States, DOE, certain DOE executives, MK-Ferguson and the Knoxville Building and Construction Trades Council to invalidate and enjoin implementation of the project labor agreement. Petitioners contended that the agreement violated the United States Constitution, the National Labor Relations Act (NLRA), the Competition in Contracting Act (CICA), the Sherman Anti-Trust Act, and the Federal Acquisition Regulations. The District Court either dismissed or granted summary judgment to all respondents on all of petitioners' claims. Pet. App. 32-C-56-G.

Petitioners appealed the dismissal of their NLRA and CICA claims. On appeal, petitioners claimed that as an M&O contractor, MK-Ferguson was an agent of DOE as a matter of law and that under this Court's decisions in *Lodge 76, International Ass'n of Machinists & Aerospace Workers v. Wisconsin Employee Relations Comm'n*, 427 U.S. 132 (1976) and *Golden State Transit Corp. v. City of Los Angeles*, 475 U.S. 608 (1986) and 493 U.S. 103 (1989), the ORO project labor agreement was preempted by the NLRA due to the government's "interference," through its agent, with petitioners' "right" to free collective bargaining. Petitioners also claimed that by permitting MK-Ferguson to enforce the restrictive subcontracting provisions of the agreement in selection of construction subcontractors, DOE breached the "full and open" competition requirements of CICA.

The court of appeals, after *de novo* review, denied petitioners' appeal. Pet. App. 30-A. The court held that in entering into construction subcontracts and negotiating the project labor agreement, MK-Ferguson was not the express agent of the United States government and was not the government's agent as a matter of law under CICA. *Id.* at 28-A-29-A. Petitioners do not seek appeal of the CICA conclusion herein.

With respect to the NLRA issues, the court of appeals concluded that the project labor agreement was not preempted under this Court's decisions in *Machinists* and *Golden State*. In the court's view, because Congress has established a mechanism for construction industry bargaining under Sections 8(e) and 8(f), 29 U.S.C. §§ 158(e) and 158(f), and because MK-Ferguson and the Knoxville Building and Construction Trades Council had negotiated for a construction industry collective bargaining agreement in precisely the manner countenanced by Congress and authorized in the NLRA, the case does not fall within the rubric of "unregulated" activity protected by *Machinists* preemption. Pet. App. 23-A. The court found further that the First Circuit's decision in *Associated Builders and Contractors v. Massachusetts Water Resources Auth.*, 935 F.2d 356 (1st Cir. 1991), *cert. granted*, 112 S. Ct. 1935 (1992) (Nos. 91-261 and 91-274) (the *Boston Harbor* case), was not controlling in this case and that, even if it were, the *Boston Harbor* decision was not an accurate application of this Court's preemption jurisprudence. *Id.* at 24-A.

Petitioners sought rehearing and rehearing *en banc*. Not one judge on the court of appeals voted to rehear the case. Pet. App. 31-B. The petition ensued.

ARGUMENT

Because this case arises from application of a privately negotiated project labor agreement on a governmentally-funded construction project, petitioners urge that this case posits an issue similar to the one now before the Court in the *Boston Harbor* case (argued December 9, 1992). The analogy quickly fails upon examination of the controlling facts and law.

First, this case arises from a federal procurement, not state regulation, and therefore no NLRA preemption issue is raised. *See, Brock v. Writers Guild of Am. W., Inc.*, 762 F.2d 1349, 1352 n.4 (9th Cir. 1985) ("issues of preemption are implicated where a state has acted in an area which is reserved to the federal government, in violation of the Supremacy Clause . . . . In contrast, [a challenge to a federal action] raises questions concerning the overlap of two federal statutes."); *see also, Britt v. Grocers Supply Co., Inc.*, C.A. Nos. 91-2493, 91-6043 (5th Cir. Dec. 15, 1992); *United States v. Boffa*, 688 F.2d 919, 932 (3d Cir. 1982), *cert. denied*, 460 U.S. 1022 (1983); *Tragash v. United States Dep't of Agric.*, 524 F.2d 1255, 1257 (5th Cir. 1976); *cf. New York Tel. Co. v. New York Labor Dep't*, 440 U.S. 519, 539 n.32 (1979). Petitioners cite no case involving federal action of any kind in which a court has applied NLRA preemption principles, nor any case involving federal action which in any way conflicts with the decision below.

Second, there is no ostensible governmental "interference" in this case because the federal government is not imposing any restrictions or compulsions on non-union contractors which affect their rights under the NLRA. Unlike in *Boston Harbor*, there is no privity of contract between DOE and any construction subcontractors. Under the DOE procurement regulations, the MK-Ferguson construction management contract, and the historical M&O contract process, all subcontracts are let by the M&O contractor, not by DOE. The government has no

contractual relationship with—and is imposing no contractual conditions on—construction subcontractors. Thus, this case involves no government-imposed restrictions. *See* M&O Contract, § I, § 7(b) 24-A; 48 C.F.R. § 5204.22 (1990); *US West Communications Services v. United States*, 940 F.2d 622 (Fed. Cir. 1991).

CONCLUSION

The petition should be denied. The *Boston Harbor* case is inapposite to this case and provides no basis for a grant of *certiorari*. Nevertheless, if the Court believes that its resolution of that case will be relevant to its disposition of the petition in this matter, respondents MK-Ferguson and Knoxville Building and Construction Trades Council request that the Court forebear acting upon this petition until it renders a decision in the *Boston Harbor* case.

Respectfully submitted,

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